

Appeal from a decision of the Eastern States Office, Bureau of Land Management, dismissing a protest of a survey plat. ES-11216.

Affirmed.

1. Surveys of Public Lands: Generally--Surveys of Public Lands: Authority to Make

The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States. The Secretary has the authority to extend or correct the surveys of public lands as may be necessary, including the surveying of lands omitted from earlier surveys. After acceptance, surveys are presumed to be correct and will not be disturbed, except upon clear proof that they are fraudulent or grossly erroneous.

2. Public Lands: Generally--Surveys of Public Lands: Generally

A survey plat depicting a previously unsurveyed island, in existence in 1845 when the State of Florida was admitted to the Union and in 1876 when an original survey was conducted in the area, is proper when the record shows that the plat of survey reflects the location of the island and the survey was conducted in accordance with both the Manual of Survey Instructions and the special instructions for the survey.

APPEARANCES: Robert A. Weigel, Esq., Lincoln, Nebraska.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Robert A. Weigel has appealed a September 10, 1996, decision of the Eastern States Office, Bureau of Land Management (BLM), dismissing his protest of a plat entitled "Survey of Islands within Pine Island Sound,

Township 43 South, Range 21 East and Townships 44 South, Ranges 21, 22, and 23 East, Tallahassee Meridian, Florida." The protest was directed specifically to that portion of the plat depicted as Tract 44, T. 44 S., R. 21 E., Tallahassee Meridian, Lee County, Florida.

The township boundaries of, and meanders and triangulations in T. 44 S., R. 21 E., were surveyed by Horatio Jenkins, Jr., U.S. Deputy Surveyor, in 1875, under a contract dated January 26, 1875, and delineated on a plat approved on June 5, 1876. Responding to an October 12, 1965, request by the Deputy Director, Bureau of Sport Fisheries and Wildlife, BLM undertook an investigation and cadastral survey to determine the status of islands which had been designated as part of a wildlife refuge by Executive Orders (E.O.'s) 939 and 943, dated September 15 and September 26, 1908. Special Instructions, Group No. 154, Florida, issued on March 18, 1969, directed the examination and survey of all unsurveyed islands in Pine Island Sound, Matlacha Pass, and San Carlos Bay, as well as those islands listed in E.O. 939 and E.O. 943.

DeWitt A. Crain, Supervisory Cadastral Surveyor, from the Denver Service Center, BLM, was assigned the task of identifying and surveying islands in T. 43 S., R. 21 E., T. 44 S., R. 21 through 23 E., and T. 45 and 46 S., R. 22 and 23 E., which had been omitted from previous surveys. He conducted his survey from October 12 to October 27, 1971, and the plat depicting the result of his examination and survey of those islands within Pine Island Sound in T. 43 S., R. 21 E., and T. 44 S., R. 21, 22, and 23 E., was accepted by BLM on October 2, 1972. 1/ That plat was officially filed on July 21, 1975.

By letter dated June 13, 1996, Weigel contacted BLM, asking it to correct the survey by showing that "Whoopee Island" 2/ is attached to Lot 1 and should be properly identified as: "That part of Government Lot 1 in Section 9, T 44, R 21 being Whoopee Island and its approach causeway."

1/ Notice of the filing of the survey plat was published in the Federal Register on May 10, 1973. Five protests were received and all five were dismissed by BLM. A group protesting the survey of Mondongo Island appealed to this Board and BLM's determination was affirmed in Chester H. Ferguson, 20 IBLA 224 (1975) (appeal dismissed, No. 75-404-Civ-T-K (M.D. Fla. July 16, 1975)). The appeal by the person protesting the survey of McCardle Island was dismissed for failure to file a statement of reasons, IBLA 74-330(A). The other three protestants did not appeal. One of those who did not appeal was James B. Turner, who claimed to be the owner of Whoopee Island. As there is nothing in the record to support an assumption that Weigel's interest flows from Turner's, administrative finality is not addressed in this decision.

2/ The local name of this island appears in several forms, "Whoopee," "Whopee," and "Whoppe," depending on the origin attributed to it. As the plat and field notes refer to Tract 44 as Whoopee Island, we will use this spelling.

In response, BLM sent a copy of the plat and field notes to Weigel, and explained that, if he wished to protest the survey, he must submit a statement of reasons setting forth evidence that the survey was in error. Weigel filed his statement of reasons, arguing that the land BLM depicted as Tract 44 is properly considered part of Useppa Island. He asserts that Crain's field notes corroborate that fact in the statement that "a weir cape connects the two." He also claimed that title companies, the State of Florida, Lee County officials, and respective taxing authorities all consider the island to be private property.

In its September 10, 1996, decision, BLM chronicled the survey history and enumerated the factors it considers when determining whether an unsurveyed island is public land. Using the 1972 field notes and other corroborating evidence in the case file, BLM reviewed Crain's conclusion that Whoopee Island was unsurveyed, separate, and distinct from Lot 1 (Useppa Island). BLM dismissed Weigel's protest, concluding that Weigel "has failed to produce any evidence showing error in the [survey]." Weigel then appealed to this Board.

In his statement of reasons for appeal to this Board, Weigel contends that Lee County records convincingly demonstrate that Whoopee Island is private property connected to Useppa Island. He asserts that the "government and people" have considered Whoopee Island to be privately held for almost a century. In support of these contentions, he has submitted the original patent to Lot 1, sec. 9 (Useppa Island), a 1993 title insurance policy for "that part of Government Lot 1 in section 9 * * *, being [Whoopee] Island and its approach causeway," and the 1996 quitclaim deed to Weigel, employing that same description. ^{3/}

[1, 2] On another occasion, this Board reviewed arguments similar to appellant's contention that Whoopee Island should not have been surveyed as a separate island. The case entitled Chester H. Ferguson, 20 IBLA 224 (1975), addressed Crain's 1972 survey of T. 44 S., R. 21 E. At page 229, we noted the Department's authority and obligations to survey omitted lands:

The authority of the Department in such circumstances to decide whether lands have been omitted from an original survey and whether the area omitted is sufficiently large enough to warrant the Government's claiming them as public lands has long been established. Kirwan v. Murphy, 189 U.S. 35, 54 (1903). The Secretary of the Interior is authorized, and is under a

^{3/} The deed conveys the grantor's interest in the described property to "ROBERT WEIGEL, Attorney and Trustee of the Realty Trust Group." None of the documents submitted in support of the protest and appeal indicate that anyone other than Weigel is involved.

duty, to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States.

This Department, acting for the United States, has the authority to extend or correct the surveys of public lands as may be necessary, including the surveying of lands omitted from earlier surveys. Joe S. Dent, 18 IBLA 375 (1975); Mrs. J. W. Moore, 8 IBLA 261 (1972); Bernard Gaffney, A-30327 (October 28, 1965); State of Oregon, 60 I.D. 304 (1949) and cases cited therein; Utah Power and Light Company, 6 IBLA 79, 79 I.D. 397 (1972).

(Footnote omitted.) The Manual of Instructions for the Survey of the Public Lands of the United States (1947) (Manual), sec. 233, which was in effect in 1971 when the survey was conducted, set out definitive instructions regarding how Crain should proceed when determining what islands to survey:

In the progress of the regular surveys every island above the mean high-water elevation of any meanderable body of water, excepting only those islands which may have formed in navigable bodies of water after the date of the admission of a State into the Union, will be definitely located by triangulation or direct measurement or other suitable process, and will be meandered and shown upon the official plat.

* * * [A]n island in any meandered body of water, navigable or non-navigable, known or proven to have been in existence at the date of the admission of a State into the Union, and at the date of the survey of the mainland, if omitted from said original survey, remains public land of the United States, and as such the land is subject to survey. This is because such islands were not then a part of the bed of the stream, and therefore their title remained in the United States, subject to survey and disposal when identified. The riparian right that attaches to the lottings along the meander line of the mainland pertains only to the bed of the stream, and to such islands as may form within the bed subsequent to the disposal of the title. The proof of the time of the formation of such islands is often more or less difficult, and it is the practice to make a careful examination of the history of an island in relation to the question of its legal ownership. [4/]

The Special Instructions, Group No. 154, Florida, at 4, prescribed further procedures for identifying omitted islands:

The examination of the islands will be directed toward a determination of whether or not they were in existence as well

4/ The current Manual in use by the Department, Manual of Instructions for the Survey of the Public Lands of the United States (1973), sets out the same general instructions at 3-122.

defined bodies of land, separate and distinct from the nearby mainland and definitely above the mean highwater elevation in 1845, the date when Florida was admitted to the Union, and at all other dates since that time.

* * * * *

If the results of the examination indicate that any of the islands were in existence as well defined bodies of land, above mean high tide, separate and distinct from the mainland at the date specified, and not included in the original subdivisional surveys of the townships, they may be considered as unsurveyed public lands to be surveyed for appropriate administrative action.

If it should be evident that the islands have formed since the date mentioned or that they are within the limits of the area shown as land upon the original plat, or that they are tidal in character, being inundated by the daily ebb and flow of the tides, no survey will be executed, but a special report will be submitted of the facts upon which the conclusions are based.

In his field notes at 6-7, Crain reported his findings regarding Whoopee island, stating:

Whoopee Island, Designated as Tract No. 44

The island's formation is in all regards similar to adjacent surveyed and unsurveyed islands. It is of sandy shell and marl formation. The true elevation of the ancient island is unknown as the island was used as an area for dredging spoil deposit. U.S. Coast Survey in 1859 depicted the island as a small island with a number of small mounds. The present elevation is from zero (0) to 4 ft. above the mean-high-tide. Timber consists of Australian pine, 4 to 30 ins. in diam., and sea grape; undergrowth consists of young trees and grass.

The character of Whoopee Island and the timber and undergrowth thereon attest to its existence on March 3, 1845, when Florida was admitted to the Union, and at all times since.

The island is well over 50% upland in character within the interpretation of the Swampland Act of September 28, 1850.

There was a fish camp on "Whoopee Island" from around 1908 until 1916 or 1917 at which time the owner of Useppa Island took over this island and used it for entertainment purposes for the guests of the resort on Useppa Island. (The name Whoopee was given this island because of the use made of it.) The only improvement other than the land fill (dredging soil deposit), at this time, is a weir which connects the two islands.

Area of Tract No. 44 is 2.49 acres.

Whoopee Island is depicted on the plat filed on July 21, 1975, as a distinct and separate island. Based on the evidence we have set out above, we find that Crain's determination to survey the island arises from two conclusions: (1) the island lies outside the meander lines of any nearby surveyed lands, the closest being Lot 1, sec. 9 (the southern portion of Useppa Island); and (2) available information conclusively indicates that Whoopee island was in existence in 1845.

A party challenging an approved survey plat must show, by a preponderance of evidence, that the plat "is fraudulent or grossly erroneous." Kendal Stewart, 132 IBLA 190, 193 (1995), James O. Steambarge, 116 IBLA 185, 188 (1990); Nina R. B. Levinson, 1 IBLA 252, 256, 78 I.D. 30, 33 (1971). None of the arguments or documents submitted by Weigel sufficiently demonstrates error in the survey plat accepted by BLM on October 2, 1972, and officially filed on July 21, 1975.

Patent No. 18015 was issued to Mamie N. Williams on May 19, 1892. This patent conveyed "the Lot numbered two of Section four and the Lot numbered one of Section nine in Township forty-four South of Range twenty-one East of the Tallahassee Meridian, in Florida, containing thirty-nine acres and fifty eight-hundredths of an acre." Nothing in this patent can be deemed evidence that Whoopee Island was a part of Useppa Island. This patent description is dependent on the 1876 survey plat, which did not depict Whoopee Island, either as a separate island or as attached to Useppa Island. 5/

Crain found the narrow strip of land between Whoopee Island and Useppa Island to be man-made. He noted in his field notes that his examination was augmented by a U.S. Coast Survey of Charlotte Harbor Approaches (January - March 1859), an aerial photograph (GS-NS 5-36) dated March 23, 1951, and a U.S. Geological Survey Topographic Map (Bokeelia Quadrangle) dated 1958. All of these documents show Whoopee Island to be distinct and separate from Useppa Island, with no connecting causeway or weir. The causeway is not visible on or mentioned in any documents dated earlier than Crain's field notes, and is not shown on any plats or photos dated prior to the photographs and drawings submitted by Weigel.

5/ In Chester H. Ferguson, *supra* at 231, we noted:

"It is true generally that the meander line is not to be treated as a boundary and that when the United States conveys a tract of land by patent referring to an official plat which shows the tract to be bordering on a navigable body of water, the patent conveys all the land to the water line."

See also, Lawyers Title Insurance Corp. v. BLM, 117 IBLA 63, 71 (1990). However, in Chester H. Ferguson we also recognized situations where the meander line would be the reference point for the boundary. Nonetheless, any interpretation of the patent description will focus on either the water line or meander depicted in the survey. In this case, the meander of Lot 1, sec. 9, did not include Whoopee Island, and the waterline of Useppa Island did not extend to Whoopee Island.

Weigel argues that the island has long been considered privately owned. This observation has no bearing on whether Crain correctly concluded that Whoopee island existed in 1845. If it did exist in 1845, and was not properly surveyed during the course of earlier surveys, it was proper to survey Whoopee island in 1972. ^{6/} The preponderance of the evidence supports Crain's conclusion that Whoopee Island was a distinct and separate island in 1845, when Florida was admitted as a state. Therefore Crain had a reasonable basis for surveying it in accordance with the Manual and Special Instructions.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision dismissing Weigel's protest of the plat entitled "Survey of Islands within Pine Island Sound, Township 43 South, Range 21 East and Townships 44 South, Ranges 21, 22, and 23 East, Tallahassee Meridian, Florida" is affirmed.

R.W. Mullen
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

^{6/} An explanation of why islands were omitted during the course of early surveys is found in Mr. and Mrs. Thomas J. Dekker, 114 IBLA 302, 307 (1990).